Appleton Asphalt, Inc. *and* Darrell J. Riehl. Case 30–CA–11368

November 9, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On December 11, 1991, Administrative Law Judge Marvin Roth issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's dismissal of the complaint, we find no basis for his statement that the son of the Respondent's coowner ''attached no significance to the fact that [employee] Flanagan rather than [alleged discriminatee] Riehl showed up on Monday morning,'' since the son of the coowner did not testify. In light of the judge's other findings, however, we agree with his conclusion that the General Counsel has not established a prima facie showing of an unlawful discharge.

Mary Beth Onacki, Esq., for the General Counsel.
James R. Long, Esq., of Appleton, Wisconsin, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Appleton, Wisconsin, on October 31, 1991.[1] The charge and amended charge were filed respectively on May 15 and June 12 by Darrell J. Riehl, an individual. The complaint, which issued on August 29 and was amended on October 17, alleges that Appleton Asphalt, Inc. (the Company or Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act. The gravamen of the complaint is that the Company allegedly discharged employee Darrell Riehl because it believed that Riehl engaged in union and protected concerted activity, specifically, by seeking other employment through a union hiring hall. The Company's answer denies the commission of the alleged unfair labor practices and asserts that Riehl quit his job. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. Briefs were waived.

Upon the entire record in this case and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a corporation with an office and place of business in Appleton, Wisconsin, is engaged at that facility in the business of construction, excavation and paving of municipal, residential and commercial roads, drives, and parking lots. In the operation of its business, the Company annually derives gross revenues in excess of $500,000, annually receives at its Appleton facility goods valued in excess of $5000 directly from suppliers outside Wisconsin, and annually derives gross revenues in excess of $50,000 from firms which receive goods valued in excess of $50,000 directly from outside Wisconsin. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES: ALLEGED UNLAWFUL DISCHARGE OF DARRELL RIEHL

The Company operates a seasonal business, from about mid-April to mid-November, the day before start of deer hunting season. Milton ''Cub'' Pelky owns the business in partnership with Russ Obermeier. The Company has 30 to 32 employees, and has always been nonunion. Darrell Riehl worked for the Company from 1986 to Monday, May 6, 1991, as an end loader operator. Like other employees he was laid off at the end of each season and recalled in the spring when the Company reopened. Riehl worked at the plant. His job was to load the raw material into bins, putting the right material into the right bin. Riehl worked as a team with Pelky's son Tim, who operated the plant and functioned as a foreman, making work assignments. Company drivers hauled the finished asphalt away from the plant to jobsites, where the Company paving crews did their work. Riehl's job was in essence the beginning of the operation. If his job was not done, no other work could be done. Riehl was recalled to work on April 22, and for 2 weeks he and a few other employees did preparatory work for resumption of operations on May 6.

Riehl testified in sum as follows: For years he had been asking, without success to transfer to the paving crew, whose hourly wage was higher than his. On April 22, his first day back at work, he told Pelky that he needed more pay because he was building a house, and again asked for a transfer to the paving crew. Pelky wanted him to remain on the loader. He said he would talk to Obermeier, but Pelky never got back to Riehl. On Friday, May 3, Riehl went to Pelky's office in Mackville (some 12 to 15 miles from the plant). Pelky's son Todd, who also worked for the Company, was present. Riehl asked Pelky if he could take a couple hours off from work on Monday, probably until 10 a.m., because he would probably look for other work and a better paying job, and would probably go to the union hall to look because

[1] All dates herein are for 1991 unless otherwise indicated.

they paid a lot better. Pelky told him it was alright if Riehl had someone to operate the loader on Monday morning. Riehl returned to work on Friday. He did not work on Saturday. He did not volunteer to do so, because he had other things to do. That weekend he asked company truckdriver Robert ''Butch'' Flanagan to fill in for him on Monday, and Flanagan agreed. (Riehl was scheduled to begin work on Monday at 6 a.m.). On Monday morning Riehl went to the hall of Laborers Local 931 to put in an application. He spoke to Al Wilder, who ran the hall. He could not go to the hall before May 6 because the Union would not take applications before that date. Riehl did not testify as to the result of his visit. He returned home, changed clothes, and reported to work about 9 a.m., taking over from Flanagan. Tim Pelky told him that his father was ''pissed off'' because Riehl went to the union hall and looked for work. About 10 minutes later Tim said that Pelky wanted to see Riehl in his office. Riehl went to Pelky's office. Secretary Joanne Weiss was present. Riehl asked what was going on. Pelky told Riehl: ''If you want to pay union dues and work here you're done. You're out of here.'' Riehl protested in sum that he was a good, longtime employee, and that he only put in an application at the union hall and did not pay any money to the Union. Pelky told Riehl to get out, ''you're done.'' Riehl asked if he could come back. Pelky initially said no, but then said he would talk to Obermeier, and if Riehl could return, Pelky's secretary would notify him the next day. She did not call Riehl. However Pelky subsequently offered Riehl a job on the paving crew, i.e., the job Riehl had long wanted. (Riehl evidently declined the offer). Robert Flanagan testified that Riehl called him on Sunday, May 5, asked him to fill in for Riehl on Monday, Flanagan did so, and Riehl returned to work about 9:45 a.m. General Counsel did not call any other witnesses.

Company Owner Pelky, the Company's only witness, testified in sum as follows: Riehl had on prior occasions asked him for a pay increase, but Riehl first mentioned his house on Friday, May 3. On that day he came to Pelky's office. Riehl said he couldn't make it on the wages he was getting and would not be in on Monday because he was going to look for a different job. Pelky answered that ''you are going to have to go.'' Pelky understood that Riehl was quitting. He called Tim Pelky and told him to put Flanagan on the loader until Pelky decided on a permanent replacement. On Monday afternoon Riehl came to his office. Riehl said he wanted his job. Pelky told him he left. Riehl complained. Pelky said he would talk to Obermeier, but didn't know if he would let Riehl return. The next day Pelky assigned driver Kent Conrad to the loader. Pelky did not fire Riehl. Rather, Riehl quit.

This case turns on a straight question of credibility, namely, whether Riehl or Pelky should be credited concerning their conversations on May 3 and 6. I credit Pelky, because his version is more probable. Assuming that Pelky was antagonistic toward unions (and even this depends on the credibility of Riehl's testimony), it is unlikely that Pelky would trick a longtime employee like Riehl, by telling him it was alright to go to the union hall, and then tell him he was fired because he did so. Rather it is more probable that if so motivated, Pelky would have warned Riehl on Friday that he could or would lose his job by going to the union hall. However, Riehl did not so testify. Also, I agree with company counsel that is improbable that Riehl could not apply for work through the Union prior to May 6 or without leaving work on that date. I do not attach significance to the fact that Riehl requested Flanagan to fill in for him on Monday. Riehl evidently tried to pressure the Company into giving him a pay raise by saying that he would not be at work on Monday, and implying, without actually using the word, that he was quitting in order to seek a better paying job. Riehl sought to cover himself by not using the word ''quit,'' if (as apparently turned out to be the case), he was unsuccessful. Therefore he asked Flanagan to fill in for him. Also Riehl wanted to be sure that the Company was not left without an operator on Monday morning. Pelky reasonably understood that Riehl was quitting. As Pelky told his son Tim to temporarily put Flanagan on the loader, Tim attached no significance to the fact that Flanagan rather than Riehl showed up on Monday morning. Flanagan, in his testimony, did not deny that Tim Pelky told him to operate the loader.[2] As I have credited Pelky, it follows that General Counsel failed to make the requisite prima facie showing of an unlawful discharge. Therefore I am recommending that the complaint be dismissed.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Company did not violate Section 8(a)(1) and (3) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed.

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[2] On the witness stand, Pelky displayed a habit of not looking directly at his questioner. I do not believe that this reflects on his credibility. Apart from their testimony concerning the facts of this case, I have no reason to question the overall credibility of either Riehl or Pelky.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.